RECENT CASES.

Accord and Satisfaction — Validity — Retention of Sum Sent as Full Payment of an Unliquidated Claim. — The validity of a contract to pay an increased price for milk being in question, the seller notified the buyer that he would hold him to the contract, and that any payments made would only be credited on account. The buyer continued to receive the goods and sent in payment checks for smaller sums accompanied by statements at the foot of which were the words "to check in full." The seller accepted these checks and sued for the balance of his claim. *Held*, that the facts do not show an accord and satisfaction. *Laroe* v. *Sugar Loaf Dairy Co.*, 180 N. Y. 367.

In New York and in most states the retention, although under protest, of a sum sent as full satisfaction of an unliquidated claim operates as an accord and satisfaction. *Fuller* v. *Kemp*, 138 N. Y. 231. That rule, resting as it must upon an implied acceptance of the offer of compromise, has been adversely criticised in some quarters. 17 Harv. L. Rev. 272; *ibid.* 469. The appropriation of a remittance, when accompanied by an express rejection of any conditions annexed, seems a conversion rather than an acceptance of the conditions. The principal case breaks away from the harsh New York rule to the extent of holding that such retention cannot be interpreted as an acceptance of the condition when, prior to its making, the buyer is informed that the seller intends to insist upon a definite claim, and that nothing is to constitute a waiver of his rights. See *Eames, etc., Co.* v. *Prosser*, 157 N. Y. 289. The distinction from Fuller *v.* Kemp is slight, but the case shows a tendency in a desirable direction. How far the seller must commit himself in order that an assent may not be implied against him is likely to prove a troublesome question.

Agency — Nature and Incidents — When Knowledge of Agent Is Imputable to Principal. — An agent, colluding with a vendor in fraudulent representations to his principal, induced the latter to purchase certain land. For his assistance the vendor secretly paid him a commission which the principal recovered at law. Subsequently the principal sued the vendor for fraud and deceit with reference to the sale. *Held*, that the prior action against the agent does not so ratify the contract in all particulars as to bar the action against the vendor for deceit. *Barnsdall* v. *O'Day*, 134 Fed. Rep. 828 (C. C. A., Third Circ.).

Where an agent has acted in fraud of his principal the latter is not ordinarily chargeable with such knowledge as the agent possessed, and may sue a third party for fraudulent representations although the agent was aware of their falsity. See *Benedict* v. *Arnoux*, 154 N. Y. 715, 728. It was contended by the defendant in the present case that a different result should be reached, because, by suing for the wrongfully obtained bonus, the principal ratified the transaction and restored the agent to his position as agent for all purposes of the purchase. Such a result seems undesirable and unnecessary. Even if no fraudulent representations had been made to the principal he might recover any bonus secretly received by his agent from other parties to the contract. *Warren* v. *Burt*, 58 Fed. Rep. 101. That recovery cannot by retroaction restore the trustworthy character of the agent, nor can it condone the perpetration of a separate and distinct wrong. Hence he and the other defrauding party as well should still be liable for the further damage resulting from fraudulent representations. See *Keator* v. *St. John*, 42 Fed. Rep. 585; *Glaspie* v. *Keator*, 56 Fed. Rep. 203.

Bankruptcy — Preferences — Perfecting Inchoate Right to Security. — The defendant, who had for nine years held a chattel mortgage on goods to be acquired by the bankrupt in the future course of his business, took possession only within four months of the commencement of bankruptcy proceedings. By the law of the state such a mortgage was not valid against creditors until possession was taken. *Held*, that the defendant's title relates back to the time when the mortgage was given, and that he has received no preference. *Thompson* v. *Fairbanks*, 196 U. S. 516. See Notes, p. 606.

Bills and Notes — Defenses — Lack of Due Presentment. — The defendant was sued as an indorser of a demand note. Sec. 131 of the Negotiable Instruments Law in New York required that a note payable on demand be presented for payment within a reasonable time. *Held*, that failure to present within a reasonable time is a

defense analogous to the statute of limitations and must be pleaded affirmatively. *German-American Bank* v. *Mills*, 99 N. Y. App. Div. 312.

It is well settled that the liability of an indorser is conditional. In order to charge him on his indorsement, there must have been due presentment of the instrument to the maker and due notice of dishonor to the indorser; and it is part of the plaintiff's case to show the fulfilment of these conditions. *Cf. Callahan* v. *Bank of Kentucky*, 82 Ky. 231. The question then arises as to what is due presentment of an instrument payable on demand. Sec. 131 of the New York Negotiable Instruments Law merely answers that question. It requires presentment within a reasonable time, but by such requirement would not appear to have made it any less a condition precedent to an indorser's liability. On principle, therefore, the decision seems questionable, and no authority has been found to support it. Indeed, a late Massachusetts case in applying the same section assumed the correctness of the contrary position. *Merritt* v. *Jackson*, 181 Mass. 69; *cf. Martin* v. *Winslow*, 2 Mas. (U. S.) 241.

BILLS AND NOTES — DEFENSES — TRANSFER OF ACCOMMODATION NOTE AFTER MATURITY. — An accommodation note was transferred by the payee before it matured, as collateral security, and additional advances were made after maturity. *Held*, that the holder is protected as to all advances. *Mersick* v. *Alderman*, 60 Atl. Rep. 109 (Conn.). See NOTES, p. 615.

CHOSES IN ACTION — WHAT MAY BE ASSIGNED — ASSIGNMENT OF PROCEEDS OF FUTURE SALES. — To secure advances of merchandise from a certain company, the defendant gave it a written order directing a person to whom he sold milk to pay the proceeds of future sales to the company. There was no contract requiring further delivery or acceptance of milk. *Held*, that the order does not operate as an assignment either at law or in equity. *O'Niel* v. *Helmke*, 102 N. W. Rep. 573 (Wis.).

In most jurisdictions a mortgage of goods to be afterwards acquired is enforceable in equity. *Holroyd* v. *Marshall*, 10 H. L. Cas. 191. There would seem to be no reason for distinguishing between choses in possession and choses in action. Accordingly, it has been held, contrary to the decision in the present case, that the proceeds of possible future sales are assignable in equity. *East Lewisburg, etc., Co.* v. *Marsh*, 91 Pa. St. 96; *Field* v. *Mayor of New York*, 6 N. Y. 179. The cases which hold that there can be no valid assignment of wages to be earned under a possible future engagement must be recognized as resting upon grounds peculiar to themselves. *Cf. Herbert* v. *Bronson*, 125 Mass. 475. This exceptional doctrine has been established to prevent workmen from mortgaging their future wages for long and indefinite periods, which would often lead to improvidence and poverty. But even in these cases, if there is an existing employment, though the contract of service is terminable at any time by either party, the assignment is supported. *Lannan* v. *Smith*, 7 Gray (Mass.) 150.

CONSTITUTIONAL LAW — CLASS LEGISLATION — DISCRIMINATING REGULATION OF STREET RAILWAY RATES. — A statute required street railway companies to carry pupils between their homes and the public schools at rates not exceeding half the regular fare between the same points. *Held*, that the statute does not infringe the Fourteenth Amendment. *Commonwealth* v. *Interstate, etc., Ry. Co.*, 73 N. E. Rep. 530 (Mass.).

A statute prescribing the maximum charge of a public service company will be held constitutional, in the absence of evidence clearly showing that such regulation will prevent the company from earning a reasonable profit on the item of business affected. *Chicago, etc., Co.* v. *City of Chicago*, 199 Ill. 484, 547; 199 *ibid.* 579, 642. A more novel point in the present decision is the validity of the discrimination between pupils of public schools and other persons. Legislation conferring special privileges on a class of persons is constitutional if public welfare creates a reasonable need for a different treatment of the individuals selected, and all persons within the class are affected alike under like circumstances. *American Sugar Refining Co.* v. *Louisiana*, 179 U. S. 89; *Magoun* v. *Illinois, etc., Bank*, 170 U. S. 283. Statutes exempting private educational institutions from taxation have been upheld. *City of Indianapolis* v. *Sturdevant*, 24 Ind. 391. Laws prescribing that text-books be supplied free to pupils, or even that clothing be furnished to poor students, have also been frequently enacted, and their constitutionality seems never to have been questioned. The duty of a state to provide a system of public education therefore seems a sufficient justification for the discrimination made by the Massachusetts legislature.

CONSTITUTIONAL LAW — PERSONAL RIGHTS — STATUTES REGULATING HOURS OF LABOR. — A New York statute rendered it a misdemeanor to require or permit an employee in a bakery or confectionery establishment to work more than sixty hours

per week, or more than ten hours per day, unless for the purpose of making a shorter work-day of the last day of the week. *Held*, that the statute is unconstitutional as an improper exercise of the police power. Harlan, White, Day, and Holmes, JJ., dissented. *Lochner* v. *State of New York*, U. S. Sup. Ct., April 17, 1905.

This reversal of the opinion of the New York Court of Appeals is significant as a check to the prevalent legislative tendency to enact labor laws. If such a statute is reasonably calculated to promote the public health and safety, courts, however dubious of the wisdom of its enactment, must sustain it as a reasonable exercise of the police power. *Jacobson* v. *Massachusetts*, 25 Sup. Ct. Rep. 358, 363. The real test is, whether the legislature has arbitrarily curtailed the individual's liberty, or has merely restricted his freedom to conserve the public interest. The majority determines that, as a matter of common understanding, the baker's trade is not an unhealthful one, and therefore the restraint imposed is unreasonable. See 17 HARV. L. REV. 418. The minority strongly combats this result, and Justice Harlan's dissent forcefully points out that the majority view brings under the court's supervision what has hitherto been regarded as the exclusive domain of the state legislatures. It may be suggested that the probable consequent reluctance to pass labor measures is likely to increase trade union activity to enable workmen to obtain benefits unaided by paternal legislation.

CONSTRUCTIVE TRUSTS — EFFECT OF STATUTE OF FRAUDS — ABSOLUTE CONVEYANCE AND ORAL PROMISE TO RECONVEY. — *Held*, that an owner of a half-interest in land who conveys his share to his co-owner upon an oral agreement by the latter to reconvey is entitled to a reconveyance because of the fiduciary relation of the parties. *Koefoed* v. *Thompson*, 102 N. W. Rep. 268 (Neb.). See NOTES, p. 614.

CONTRACTS — REMEDIES FOR BREACH — JUDGMENT ON INSTALMENTS ALREADY DEFAULTED A BAR TO RECOVERY FOR REMAINDER. — The plaintiff contracted to purchase of the defendant a quantity of goods deliverable in instalments at a price payable on each delivery. After partial delivery the plaintiff obtained a judgment for breach in failing to make the deliveries then due, and upon maturity of all the instalments sued for breach of the remainder of the contract. *Held*, that he cannot recover, since the cause of action relied upon in the former suit was a breach of the entire contract and the judgment therein is conclusive. Two justices dissented. *Pakas* v. *Hollingshead*, 99 N. Y. App. Div. 472.

The distinction is not always kept in view that while but one judgment is possible upon a single cause of action, a number of causes of action may issue from one contract. Theoretically it would seem that there are as many causes of action upon an instalment contract as there are failures to deliver; that if the breach is material the injured party may elect to rescind the contract, or to consider it still existing and pursue his remedies upon it; and that the remedies of buyer and seller should be the same. *Cf. Richmond* v. *Dubuque, etc., R. Co.*, 40 Ia. 264. Two rules of procedure, however, qualify the plaintiff's rights. He must unite actions for all breaches subsisting at the time of suit. *Reformed, etc., Church of Westfield* v. *Brown*, 54 Barb. (N. Y.) 191. If the breach amounts to total repudiation, one judgment bars his remedies, for upon instalments not due damages are confined to profits, and those are recoverable immediately. See *Clark* v. *Marsiglia*, 1 Den. (N. Y.) 317. Whether or not there is repudiation must be determined from the evidence; but in the present case it may, perhaps, fairly be questioned whether the mere failure to deliver the earlier instalments should be thus construed.

CORPORATIONS — FOREIGN CORPORATIONS — WHAT CONSTITUTES DOING BUSINESS. — A Pennsylvania insurance corporation regularly solicited business in New York, insured property there by contracts made in Pennsylvania through the mails, and sent its agents to New York to adjust losses. *Held*, that for the purpose of jurisdiction over the corporation it is doing business in New York. *Pennsylvania, etc., Insurance Co.* v. *Meyer*, U. S. Sup. Ct., April 3, 1905.

The question what constitutes doing business by a foreign corporation is usually presented under a state statute imposing conditions thereon, — the payment of a tax, for example, or the filing of a certificate of its financial condition. The natural meaning of the term is often variously warped and narrowed in accordance with the supposed intent of the legislature to avoid interference with some policy of the state or with interstate commerce. *Commonwealth* v. *Standard Oil Co.*, 101 Pa. St. 119, 148; *Coit & Co.* v. *Sutton*, 102 Mich. 324. In that line of cases the temper of the courts is decidedly against the decision in the principal case. *People* v. *Gilbert*, 44 Hun (N. Y.) 522; *New Orleans* v. *Virginia, etc., Insurance Co.*, 33 La. Ann. 10. But here the question is whether the corporation has not done business in the state so that it may fairly

be subjected to jurisdiction on proper service. The court is restrained by no adverse policy; it is rather encouraged to furnish domestic relief to domestic plaintiffs, and may well decide on the natural, though difficult, basis of fact. This distinction is not expressed in the cases, but, it is submitted, will avoid some of the confusion on the subject. *Cf. Colorado Iron-Works* v. *Sierra Grande Mining Co.*, 15 Col. 499.

CORPORATIONS — PROMOTERS — LEASE TO CORPORATION TO BE FORMED. — A lease was executed to an association not at the time in existence. After incorporation the association accepted the lease, entered into possession of the premises, and for several years paid rent in accordance with the terms of the lease. This action for subsequently accruing rent was brought against its directors, under a statute imposing liability upon them for debts of the association payable within one year from the date when they were contracted. *Held*, that there can be no recovery against the defendants, since the liability of the association for rent due was incurred, not by use and occupation, but under the covenant in the lease. *Thistle* v. *Jones*, 45 N. Y. Misc. 215.

By the decided tendency of American authority corporations may assume the obligations of contracts made in their behalf by promoters. The technical difficulties in the way of reaching this result have given rise to considerable diversity of reasoning on the part of the courts, the usual ground of decision being either ratification or adoption, while in a few cases a novation has been implied. See 12 HARV. L. REV. 506; 14 *ibid.* 536. Where the obligation is in form a lease under seal, however, it would seem that at best only a tenancy from year to year could be established on any of these grounds. This added difficulty is obviated in the principal case by the court's presuming from the facts an assignment of the lease to the corporation, since an assignee of a lease is liable on the covenants therein. Such a presumption is permitted by the law of New York, and the court's line of reasoning in taking advantage of it is entirely in accord with the spirit of the American cases. *Cf. Bedford* v. *Terhune*, 30 N. Y. 453.

CORPORATIONS — STATUTORY LIABILITY OF STOCKHOLDERS — ENFORCEMENT IN FOREIGN JURISDICTIONS. — An Ohio statute provided for the enforcement of individual liability of stockholders in corporations by an action against all the stockholders for the benefit of all the creditors of the corporation, and indicated a maximum amount of costs recoverable against a stockholder in such an adjudication. *Held*, that the remedy thus provided cannot be pursued outside of Ohio. *Middletown National Bank* v. *Toledo, etc., Ry. Co.*, 25 Sup. Ct. Rep. 462.

It is now well settled that a stockholder is under no liability to creditors of the corporation beyond the amount of his subscription unless such liability is imposed by statute. *Gray* v. *Coffin*, 9 Cush. (Mass.) 192. If liability is imposed by a statute of the state in which a corporation is chartered it will ordinarily be enforced by the courts of another state against stockholders within their jurisdiction. *Flash* v. *Conn*, 109 U. S. 371. The principal case shows, however, an important qualification to this general rule. If the liability created by the statute can be enforced only by some particular form of procedure it cannot be enforced in a foreign state unless the same kind of proceedings may be taken there. *May* v. *Black*, 77 Wis. 101. This doctrine seems obviously sound. Although stockholders assume the obligations imposed by the laws under which they are incorporated, they cannot be said to assume any others, and a view opposed to that illustrated by the principal case would subject stockholders residing outside of the state of incorporation to a burden greater than that borne by domestic stockholders. See *Bank* v. *Francklyn*, 120 U. S. 747.

CORPORATIONS — STATUTORY LIABILITY OF STOCKHOLDERS — NATURE OF LIABILITY OF STOCKHOLDER IN NATIONAL BANK. — A statute of Washington limited the right to bring an action upon a contract, express or implied, to three years. *Held*, that the liability of a stockholder in a national bank to creditors is not embraced within the statute. White, Brown, and McKenna, JJ., dissented. *McClaine* v. *Rankin*, 25 Sup. Ct. Rep. 410.

The statutory liability of ordinary stockholders is generally regarded as contractual. See 18 HARV. L. REV. 456. Accordingly an assignee of a claim against a corporation gets his assignor's right against stockholders. *Blakeman* v. *Benton*, 9 Mo. App. 107. Again, this right may be enforced outside of the state creating it, and will survive against the representative of a deceased stockholder. *Flash* v. *Conn*, 109 U. S. 371; *Richmond* v. *Irons*, 121 U. S. 27. So, too, a statute repealing a provision for individual liability is unconstitutional. *Hawthorne* v. *Calef*, 2 Wall. (U. S.) 10. Finally, the right is barred by the statute limiting the remedy on contracts. *Carrol* v. *Green*, 92 U. S. 509. The court seeks to distinguish the latter case from the present one, on the ground that

there the stockholder's liability to creditors was direct, while here it does not arise until an assessment by the comptroller. This ignores the difference between obligation and liability. The obligation is part of the stockholder's contract of subscription and is therefore contractual; but his liability is subject to the condition precedent of an assessment by the comptroller. Moreover this assessment would seem to provide a mode of enforcing the obligation rather than to affect its creation. The decision is contrary to *dicta* in previous cases. See *Matteson* v. *Dent*, 176 U. S. 521, 526.

CORPORATIONS — STOCKHOLDERS: RIGHTS INCIDENT TO MEMBERSHIP — DISTRIBUTION OF DIVIDENDS BETWEEN LIFE TENANT AND REMAINDERMAN. — A corporation having assets valued far above its nominal capital, sold part of the property and declared a cash dividend from the proceeds. Both the life tenant and the remainderman of certain stock demanded the dividend, the former claiming it as declared from profits, the latter, as arising from surplus which by permanent investment had become capital. *Held*, that the life tenant is entitled to the dividend. *Smith* v. *Dana*, 60 Atl. Rep. 117 (Conn.).

Under the Massachusetts rule, by which cash dividends go to the life tenant as income, and stock dividends to the remainderman as capital, this case seems correct. *Minot* v. *Paine*, 99 Mass. 101. However, if a dividend is clearly declared from the proceeds of the sale of part of the capital stock, it goes to the remainderman. *Heard* v. *Eldredge*, 109 Mass. 258. That exception does not seem to apply here, for as the property value still exceeds the nominal capital of the corporation, the capital stock remains intact. Furthermore, surplus invested in permanent improvements would seem to become capital only in the broad sense of funds engaged in the business, which, unless new stock had been issued, directors could again withdraw and distribute as profits. MORAWETZ, PRIVATE CORPORATIONS, 2d ed., §§ 452, 453. But see *Hemenway* v. *Hemenway*, 181 Mass. 406. Under the Pennsylvania rule that surplus earned before the death of the testator goes to the remainderman, and that earned thereafter, to the life tenant, irrespective of the form of the dividend, the remainderman would be entitled here. For a discussion of the merits of these different rules, see 16 HARV. L. REV. 54.

CRIMINAL LAW — NEGLIGENCE — RESPONSIBILITY FOR FAILURE TO USE PRAYER. The defendant, honestly believing prayer to be the only efficacious remedy for disease, neglected to furnish either medical attendance or prayer for an ailing minor to whom he stood *in loco parentis*. No statute within the jurisdiction required a parent to furnish medical attendance to a sick child. *Held*, that the defendant cannot be convicted of homicide. *State* v. *Sandford*, 59 Atl. Rep. 597 (Me.).

The common law generally refuses to hold a parent for failure to provide medical attendance in which he conscientiously disbelieves, the reason being the absence of *mens rea*. *Regina* v. *Wagstaffe*, 10 Cox C. C. 530. For him certain remedies are as if non-existent. When the parent wantonly fails to furnish what he conscientiously can, the question must yet arise whether that omission has any causal connection with the fatality. Certain methods of treating the sick are almost uniformly recognized as scientific and effectual. If they be carelessly withheld a jury may hear testimony as to their efficacy under the circumstances. But upon the efficiency of unaided prayer society is not so nearly agreed. The jury has then no premise upon which to base their investigation, the result of which will therefore depend upon the accidental beliefs of the twelve individuals. In such a case, the court well says, the prisoner cannot properly be tried. Statutes have elsewhere sought to avoid this disappointing result by imposing upon parents a definite legal duty.

DEEDS — QUITCLAIM DEEDS — OPERATION UNDER RECORDING ACTS. — A recording act provided that every conveyance should be void as against a subsequent purchaser in good faith whose conveyance was first recorded. *Held*, that the grantee in a subsequent quitclaim deed is not protected as a purchaser in good faith against a prior unrecorded warranty deed. *Fowler* v. *Will*, 102 N. W. Rep. 598 (S. Dak.).

At common law, since a quitclaim deed purports to convey only such right as the grantor has, the grantee is put upon inquiry and takes the estate subject to existing claims, legal and equitable. *Cf. Oliver* v. *Piatt*, 3 How. (U. S.) 333, 410. By a number of courts this doctrine has been used to interpret the recording acts. *Steele* v. *Sioux Valley Bank*, 79 Ia. 339. But those courts illogically fail to affect with notice one who takes by deed of warranty from the grantee of a quitclaim deed. *Winkler* v. *Miller*, 54 Ia. 476. The recording laws, however, provide a statutory estoppel for the protection of innocent purchasers. And, since it is neither necessarily nor usually true that a quitclaim deed comes to its grantee tainted with distrust, it seems that he should be equally protected if he has purchased in good faith, for value, and without

notice of prior conveyances. Such has become the prevailing view. *Boynton* v. *Haggart*, 120 Fed. Rep. 819. If this form of deed affects at all the rights of the purchaser, it should be only to direct the attention of the jury to the question of notice or good faith in purchasing. *Cf. Mansfield* v. *Dyer*, 131 Mass. 200.

EASEMENTS — EXTINGUISHMENT — SUSPENSION BECAUSE OF MISUSER. — A way appurtenant to certain premises was being used for the benefit of adjoining land in such manner that it was impossible to separate the lawful from the unlawful user. *Held*, that the easement is not extinguished, but that the defendant and its agents will be enjoined from using the easement and from extending invitation or furnishing occasion to tenants or others to use it, until the wrongful user is made impossible. *McCullough* v. *Broad Exchange Co.*, 92 N. Y. Supp. 533. See NOTES, p. 608.

ESTOPPEL — ESTOPPEL IN PAIS — STANDING BY WHILE IMPROVEMENTS ARE MADE ON LAND. — The defendant obtained a deed of certain land from a stranger to the title. The true owner, who learned of this transaction within ten days, stood by in silence for three years while the defendant made improvements on the land, and then brought action to quiet title. *Held*, that the plaintiff is estopped to deny the defendant's title. *Baillarge* v. *Clark*, 79 Pac. Rep. 268 (Cal.).

It is generally accepted law that where an owner of chattels or land stands by and allows another to pay value to a stranger under the belief that he is acquiring title the owner will be estopped to assert his right. *Pickard* v. *Sears and Barrett*, 6 Ad. & El. 469; *Chapman* v. *Chapman and Gansammer*, 59 Pa. St. 214. The justice of this rule is obvious, for if the price paid for the land is adequate, the buyer's gain by the estoppel will be equal to his loss by the owner's neglect. A more questionable rule is applied in the principal case. There the damage caused by the owner's carelessness was the value of the improvements only, for he did not stand by during the *pseudo* sale; but the gain to the buyer by the estoppel was the value of the land as well as of the improvements. As these particular improvements were in the form of a railroad bed, the plaintiff could not have been allowed to recover on condition that he pay for them; but the same result has been reached in the case of an ordinary house. *Green* v. *Smith*, 57 Vt. 268. Such a result seems unduly severe.

FIXTURES — RAILS OF STREET RAILWAY AS FIXTURES. — *Held*, that rails affixed to the soil of a public street by an electric railway company are personalty. *Lorain Steel Co.* v. *Norfolk, etc., Ry. Co.*, 73 N. E. Rep. 646 (Mass.). See NOTES, p. 610.

ILLEGAL CONTRACTS — PUBLIC POLICY — CONTRACT TO CONVEY ALL AFTER-ACQUIRED PROPERTY. — As part of the consideration for admission into the plaintiff institution, the defendant agreed to convey to it all property that he might afterwards acquire. The plaintiff reserved the right to require the defendant's removal, if he disobeyed the rules of the institution or if he became insane. *Held*, that the contract is unenforceable as against public policy. *Baltimore, etc., Homes* v. *Pierce*, 60 Atl. Rep. 277 (Md.).

The assignment of a contingent interest or mere expectancy will be given effect in equity, not as a grant but as a contract, if fairly made and not against public policy. *McDonald* v. *McDonald*, 5 Jones Eq. (N. C.) 211; *Stover* v. *Eycleshimer*, 46 Barb. (N. Y.) 84. The only ground, then, for refusing damages at law in the principal case, there being good consideration and no fraud, is that of public policy. This entails a balancing of opposing considerations, the relative importance of which may well be the subject of difference of opinion. On the whole, however, it would seem that the possibility of hardship to this defendant was of minor importance as against the desirability of maintaining freedom of contract; and that, as the plaintiff was a charitable institution for aged people, the possibility of the defendant's becoming a public charge through removal, after having conveyed property subsequently acquired, was counterbalanced by the probability of his becoming a public charge unless admitted. Notwithstanding the view taken by the court, therefore, it may fairly be contended that the public welfare would be subserved rather than injured by the enforcement of such contracts.

LEGACIES — LAPSED BEQUESTS — APPLICATION OF STATUTE PREVENTING LAPSE. A statute provided that "whenever any estate shall be bequeathed to a child of the testator, and such child shall die during the lifetime of the testator, leaving a child who shall survive such testator, such legacy shall not lapse, but the property so devised shall vest in the surviving child of the legatee." A testator directed his executor to pay "five hundred dollars to each of my children." *Held*, that the issue of a son known by the testator to have died before the execution of the will are entitled to five hundred dollars. *Pimel* v. *Betjemann*, 99 N. Y. App. Div. 559.

Under this statute it has been held that the issue of a son specially named in the will, who was dead when the will was made, would take. *Barnes* v. *Huson*, 60 Barb. (N. Y.) 598. And under a similar statute the same result was reached on those facts, even though the testator knew that the child was dead when the will was executed. *Barkworth* v. *Young*, 4 Drewry 1. The reason for these decisions is that the testator probably intended to benefit the estate of persons specifically named. *Mower* v. *Orr*, 7 Hare 473. The rights of the issue under the statute are, however, substitutionary, and where, as in the principal case, the father was not specially named it is difficult to see how there was any gift intended for him in respect to which his issue may be substituted. The decision is opposed to the only similar case found, and seems antagonistic in principle to the rule of construction adopted in those cases where, independently of statute, the testator attempts to give the issue their deceased parents' share by way of substitution. *Howland* v. *Slade*, 155 Mass. 415; *In re Hotchkiss's Trusts*, L. R. 8 Eq. 643.

LIMITATION OF ACTIONS — IGNORANCE OR FRAUD — FRAUDULENT CONCEALMENT OF CAUSE OF ACTION. — The Wisconsin statute of limitations excepted from its scope certain actions based on fraud until the discovery by the aggrieved party of the facts constituting the fraud. To a plea of this statute the plaintiff replied that the defendant had fraudulently concealed the cause of action. *Held*, that since the action does not come within the excepted class, it is barred. *Pietsch* v. *Milbrath*, 102 N. W. Rep. 342 (Wis.).

In construing statutes of limitations containing no exemption clauses, some courts have been inclined to deny the defense to one who has concealed the existence of the plaintiff's cause of action for the statutory period. *Cf. First, etc., Corporation* v. *Field*, 3 Mass. 201. Several of these decisions, however, may perhaps be explained on the ground that in their jurisdictions there were no equity courts to relieve the plaintiff against its effect. And the better opinion certainly holds that no exception can be read into such a statute. *Board, etc., of Somerset* v. *Veghte*, 44 N. J. Law, 509. When, as in the present case, the legislature has provided that causes of action based upon fraud, which have been concealed, shall not be deemed to have accrued until discovered, it would seem clear that according to a well recognized canon of statutory construction causes of action not based on fraud should not be entitled to the same exemption. See *Amy* v. *City of Watertown*, 22 Fed. Rep. 418, 420. The present case, therefore, seems preferable to a contrary decision reached under a similar statute in Iowa. *Cf. District, etc., of Boomer* v. *French*, 40 Ia. 601.

MORTGAGES — PRIORITY — RIGHT OF PRIORITY OVER THE CORPORATE MORTGAGE. — The petitioner sold railway ties to a quasi-public corporation one month prior to the appointment of a receiver. *Held*, that the petitioner's claim is not preferred over a prior mortgage. *Gregg* v. *Metropolitan Trust Co.*, 25 Sup. Ct. Rep. 415. See NOTES, p. 605.

NOTICE — CONSTRUCTIVE NOTICE — PURCHASER FROM DISSEISOR HAS NOTICE OF DEED TO DISSEISEE. — A disseisor held land for the statutory period and sold to one without actual or record notice of the deed to the disseisee. *Held*, that the buyer has constructive notice of recitals in that deed. *Re Nesbitt and Potts' Contract*, 53 W. R. 297 (Eng., Ch. D.).

Where a purchaser cannot make out title except by a deed which leads to another fact, he is presumed to have knowledge of that fact. *Patman* v. *Harland*, 17 Ch. D. 353, 355; *Van Doren* v. *Robinson*, 16 N. J. Eq. 256, 261. Title by adverse possession is a new title not derived from the disseisee. *Tichborne* v. *Weir*, 67 L. T. R. 735. Nevertheless the estate acquired is limited in extent by the estate to which it was adverse. If, for example, that was a life estate, the disseisor's estate can be only *pur autre vie*, for as it was never adverse to the remainder it could not extinguish it. *Moore* v. *Luce*, 29 Pa. St. 260. It follows that in no case can the buyer from the disseisor establish absolute title without referring to the deed to the disseisee to find his interest. Therefore, although no application of the general rule has been found except to deeds through which title is actually derived, yet as the basis of it is not derivation but reasonable proof of title, it seems logically to apply to the case in hand, subject to qualification where access to the deed is practically impossible. See *Patman* v. *Harland*, 17 Ch. D. 353, 356.

PERPETUITIES — RULE AGAINST A POSSIBILITY ON A POSSIBILITY. — A testatrix devised realty to trustees and their heirs in trust to pay the income to her children and the survivor for life, and then to their children for lives. To the survivor of the latter she devised the property in tail. *Held*, that the rule against perpetuities applies to

legal contingent remainders and so makes the gift in tail void. *In re Ashforth's Trusts*, 21 T. L. R. 329 (Eng., Ch. D.).

This decision, though by a single judge, may well settle the English law on the point. For a discussion of the question, approving the conclusion of this case, see 16 HARV. L. REV. 294.

PHYSICIANS AND SURGEONS — NECESSITY OF PATIENT'S CONSENT TO OPERATION. A surgeon, by telling his patient that a very slight operation was necessary, induced her to take ether, and removed her uterus. *Held*, that the patient may recover exemplary damages. *Pratt* v. *Davis*, 37 Chic. Leg. N. 213 (Ill., App. Ct., First Dist., 1905).

It is usually said that a surgeon must obtain the patient's consent before performing an operation; and it seems clear that such an act, being a battery, requires justification. It is sometimes contended, however, that a surgeon may be justified by various circumstances other than the acquiescence of the patient; and an English case has been found which, although decided upon the ground of implied consent, can hardly be supported on that basis. *Cf. Beatty* v. *Cullingworth*, 10 HARV. L. REV. 376. This court is clearly disinclined to permit surgeons to remove an organ from the body without the patient's actual concurrence; and in view of the serious interference with the person which such an act involves, this rule should be applied wherever consent could possibly have been obtained. However, if in order to save life an operation must be performed before consent can be obtained, practical necessity would seem to justify the surgeon in acting; and the jury should be allowed to decide whether he could fairly assume that the plaintiff would have consented.

PLEDGES — WRONGFUL RE-PLEDGE — TROVER BY PLEDGOR WITHOUT TENDER. *Semble*, that a pledgee who wrongfully sells or re-pledges is not liable to his pledgor in trover without a tender of the debt. *Ames* v. *Sutherland*, 5 Ont. W. Rep. 328. See NOTES, p. 610.

PRESUMPTIONS — NATURE AND SCOPE — RELATION OF PRESUMPTIONS TO EVIDENCE. — A guardian was made a beneficiary under the will of his ward. *Held*, that the consequent presumption of undue influence not only places upon the guardian the burden of proof, but should be weighed as evidence by the jury. *In re Cowdry's Will*, 60 Atl. Rep. 141 (Vt.).

The court considers the views of Professor Thayer upon the subject of presumptions, but prefers to follow what seems to be the trend of authority in Vermont. A case in Connecticut, where the court reached a different conclusion, was noted in 18 HARV. L. REV. 546.

RESCISSION — RESCISSION FOR MISTAKE — UNILATERAL MISTAKE. — The plaintiff by mistake put in a lower bid for a contract than he had intended making. The defendant accepted the bid, without notice of the mistake. *Held*, that equity will rescind the contract. *Board, etc., of Indianapolis* v. *Bender*, 72 N. E. Rep. 154 (Ind., App. Ct.).

Equity will give rescission for a unilateral mistake against a donee. *Andrews* v. *Andrews*, 12 Ind. 348. In an analogous case, rescission has been granted of a conveyance in which by a unilateral mistake the grantee is getting what he did not expect, and what the grantor clearly did not mean to convey. *Brown* v. *Lamphear*, 35 Vt. 252. Such relief may also be had where the defendant in accepting an offer or conveyance knowingly took advantage of the plaintiff's error. *Garrard* v. *Frankel*, 30 Beav. 445. But with these exceptions, the great weight of authority is that equity will not give rescission for a mere unilateral mistake. *Moffett, etc., Co.* v. *City of Rochester*, 91 Fed. Rep. 28; *contra*, *Harris* v. *Pepperell*, L. R. 5 Eq. 1 (*semble*). Much may be said in favor of the exercise of the jurisdiction to rectify mistakes in a case where nothing has been done under a hard bargain which the plaintiff did not intend to make: but the difficulty of deciding what is a sufficiently damaging mistake, and the fact that a door would be opened to the admission of all manner of excuses for improvident contracts, as a matter of policy, perhaps justify a denial of relief.

RESTRAINT OF TRADE — STATE ANTI-TRUST LEGISLATION — CONSTRUCTION. — A statute provided that a contract between two or more corporations restraining competition in business or placing the management of the affairs of the corporations in the power of any persons other than their proper agents should be unlawful. Several railroad companies formed a car service association for the purpose of insuring impartial assessment of demurrage. To this end certain rules were adopted and a manager was appointed to attend to their proper enforcement. *Held*, that upon a proper con-

struction of the statute it is not violated by this combination, which is not inimical to public welfare. *Yazoo, etc., R. R. Co.* v. *Searles*, 37 So. Rep. 939 (Miss.).

The court decided that this combination did not place the business of the corporations in the control of the management of the association, and construed the statute as being inapplicable to combinations which would not, in their results, be at variance with public policy. The decision well illustrates the tendency of the courts to give a liberal construction to what is called anti-trust legislation. See *Whitwell* v. *Continental Tobacco Co.*, 125 Fed. Rep. 454. While these enactments are properly applied to combinations injurious to the welfare of the public, yet, in cases where their tendency is not harmful, the language, if possible, is regarded as limited by the power which each individual has to manage his own property. *Cf. Northern Securities Co.* v. *United States*, 193 U. S. 197, *per* Brewer, J.

RESTRICTIVE AGREEMENTS — LIABILITY OF PERSON HOLDING UNDER DISSEISOR. The defendant contracted to buy land from the plaintiff, assignee of a disseisor whose adverse possession had begun twenty-three years before. The disseisee had been bound by a negative restrictive covenant. *Held*, that the defendant may refuse to take the land, since the right of the covenantee would be enforceable against him. *Re Nesbitt and Potts' Contract*, 53 W. R. 297 (Eng., Ch. D.). See NOTES, p. 608.

RIGHT OF PRIVACY — INFRINGEMENT — UNAUTHORIZED USE OF PORTRAIT FOR ADVERTISING PURPOSES. — The plaintiff sued the defendants for damages resulting from the unauthorized use of his portrait in an advertisement. The defendants demurred. *Held*, that such publication is actionable as a violation of the right of privacy. *Pavesich* v. *New England, etc., Co.*, 50 S. E. Rep. 68 (Ga.).

Although the existence of a right of privacy has been much discussed of late years, this is the first decision of a court of last resort putting recovery squarely upon that basis. It is believed that an article in this REVIEW, cited in the principal case, first clearly declared that such a right existed. *Cf.* 4 HARV. L. REV. 193. Before that time no decisions relied upon its existence, but the courts based similar cases on breach of trust or violation of a property right. *Yovatt* v. *Winyard*, 1 J. & W. 394; *Pollard* v. *Photographic Co.*, 40 Ch. D. 345. Since then several cases in discussing the right of privacy have differed regarding its existence. One case which purports to deny it really decides only that the right is at most personal, ending at death. *Atkinson* v. *Doherty*, 121 Mich. 372. Prior to the principal case the only square decision by a court of last resort held that no such right existed. *Roberson* v. *Rochester, etc., Co.*, 171 N. Y. 538; see 15 HARV. L. REV. 227. This court was divided, its decision was received with regret, and the legislature soon passed a law to meet the evil. It seems probable, therefore, that the principal case will have a following.

SALES — CONDITIONAL SALES — FORFEITURE OF INSTALMENTS. — The trial court refused to rule that when the buyer in a conditional sale makes default as to one instalment all prior instalments are forfeited. *Held*, that the refusal is not error. *Shafer* v. *Russell*, 79 Pac. Rep. 559 (Utah). See NOTES, p. 611.

SPECIFIC PERFORMANCE — GENERAL NATURE AND SCOPE OF EQUITABLE RELIEF — ADEQUACY OF LEGAL REMEDY IN CONTRACTS FOR SALE OF LAND. — The defendant, for valuable consideration, gave the plaintiff an option to buy a piece of land for the sum of nine thousand dollars. The plaintiff's bill for specific performance alleged that he had contracted to sell the land to a third person for fourteen thousand dollars. The defendant demurred. *Held*, that inasmuch as the plaintiff, on his own showing, has an adequate remedy at law, he must seek his remedy there. *Hazelton* v. *Miller*, 33 Wash. Law Rep. 217.

Contracts to sell land which the seller has agreed to buy or on which he holds an option are of every-day occurrence. Yet no case has been found where the original seller has been allowed to set up his purchaser's contract for resale as a defense to a suit for specific performance. Originally, of course, the jurisdiction of equity in contracts concerning real estate was based on the difficulty of a fair appraisal of the value of the land to the purchaser, but the relief has long since been allowed as a matter of course. See STORY, EQ. JUR., 12th ed., §§ 717, 751. *Contra*, in suits by the vendor, *Porter* v. *Land Co.*, 84 Me. 195; *Kauffman's Appeal*, 55 Pa. St. 383. Sustaining a demurrer, therefore, in the principal case, where a plea ought to have been of no avail, seems unfortunate. The plaintiff did not even ask for an alternative remedy — specific performance or the value of his bargain. *Cf. Dowling* v. *Betjemann*, 2 John. & H. 544. Moreover, the court entirely overlooked the fact that, by refusing the plaintiff relief, they were not only exposing him to an action by his purchaser, but also depriving the latter of his right to specific performance of his contract. *Cf. Shriver* v. *Seiss*, 49 Md. 384.

Statute of Frauds — Sufficient Memorandum — Undelivered Deed as Memorandum. — The defendant agreed to grant the plaintiff a lease, only part of the terms of which was contained in the memorandum delivered to the plaintiff. The remaining terms were supplied by the lease later executed by the defendant, but retained in its possession. *Held*, that the prior writing and the lease together constitute a sufficient memorandum to satisfy the Statute of Frauds. Four justices dissented. *Charlton* v. *Columbia Real Estate Co.*, 60 Atl. Rep. 192 (N. J., Ct. App.).

In England it has been held that the memorandum of a sale need not be delivered in order to satisfy the Statute of Frauds. *Johnson* v. *Dodgson*, 2 M. & W. 653. A Maryland case reaches the same result. *Drury* v. *Young*, 58 Md. 546. The great weight of American authority, however, holds the requirement unsatisfied if possession of the memorandum be retained by the party to be charged. Hence a deed containing the particulars of a sale of land is not a sufficient memorandum unless delivered by the grantor. *Parker* v. *Parker*, 1 Gray (Mass.) 409; but see *Parrill* v. *McKinley*, 9 Gratt. (Va.) 1. On the other hand, the American courts generally hold, with the principal case, that an undelivered deed is available to supplement an incomplete delivered memorandum. *Wood* v. *Davis*, 82 Ill. 311. On this last ground the New Jersey court distinguishes an earlier decision in which an undelivered deed was held insufficient by itself. *Brown* v. *Brown*, 33 N. J. Eq. 650. Inasmuch as the memorandum ordinarily operates by way of admission, on principle the question of delivery would seem to be irrelevant. The American rule requiring delivery is apparently due to a failure to distinguish between the writing as evidence to satisfy the statute and as a written contract.

Suretyship — Variation of Risk — Effect of Plaintiff's Breach of Contract to Insure. — The defendant was a surety for a building contractor, whose contract provided that the plaintiff, the owner, should insure for his own and the contractor's benefit. *Held*, that the defendant is not discharged, by the plaintiff's failure to insure, since, as no fire occurred, he was not injured thereby. *Hohn* v. *Shideler*, 72 N. E. Rep. 575 (Ind., Sup. Ct.).

Variation of the surety's risk occurs either where the obligee has done something which, owing to the relationship of the parties, he should not have done, or where there has been a material alteration of the contract of suretyship. *Cf.* 16 Harv. L. Rev. 511. In the first case, as where additional securities, not stipulated for in the contract of suretyship, are released, the defense, being an equitable one, discharges the surety only in proportion to his possible injury. *Green* v. *Blunt*, 59 Ia. 79. In the second case, the defense, being legal, is a complete discharge, regardless of harm to the surety. *Miller* v. *Stewart*, 9 Wheat. (U. S.) 703. In a case similar in other respects to the present one, a fire, occasioning some loss, occurred, and it was held that the surety was completely discharged. *Watts* v. *Shuttleworth*, 7 H. & N. 353. The decision there regarded the surety's undertaking as changed by the owner's failure to insure. Under this view, which seems the correct one, the absence of actual injury to the surety, considered decisive in the principal case, is immaterial. *Cf. Bethune* v. *Dozier*, 10 Ga. 235.

Trusts — Creation and Validity — Revocation. — The plaintiff's intestate made a deposit of her own money in a savings bank "in trust for Margaret Brown," and prior thereto declared her intention that the account should be for the benefit of the person designated. *Held*, that an irrevocable trust is thereby created. *O'Brien* v. *Williamsburg Savings Bank*, 101 N. Y. App. Div. 108.

This appears to be an effort, on the part of the Appellate Division, to escape from the doctrine laid down by the Court of Appeals in *In re Totten*, 179 N. Y. 112, which was adversely criticised in 18 Harv. L. Rev. 70.

Waters and Watercourses — Surface Waters — Right to Drain Surface Water from Adjoining Land. — The parties owned adjoining lands covered by a body of water twenty-five hundred acres in area, fed solely by rain and snow, and varying in depth from three to six feet. The defendant, in order to reclaim his land, constructed thereon a ditch which drained the water from the plaintiff's land and ruined his valuable fishery. *Held*, that the plaintiff cannot recover. *Applegate* v. *Franklin*, 84 S. W. Rep. 347 (Mo., St. Louis Ct. App.).

The fact that surface water collects temporarily in considerable quantities in a natural depression, does not alter its character. *Boynton* v. *Gilman*, 53 Vt. 17. But if the pond formed be permanent, it ceases to be surface water, and may not be drained without the consent of all whose land it covers. *Schaefer* v. *Marthaeler*, 34 Minn. 487. Assuming that the court correctly found the pond in question to be surface water, the case raises a new problem: whether for purposes of improvement one may arti-

ficially drain his land and thereby deprive an adjoining proprietor of surface water. An upper owner may not, by artificial drainage, discharge a body of surface water upon lands below. *Rhoads* v. *Davidheiser*, 133 Pa. St. 226. But he has an absolute right to surface water before it reaches the lower owner. *Broadbent* v. *Ramsbotham*, 11 Exch. Rep. 602. Even in jurisdictions which limit the owner's right in percolating waters to reasonable user, artificial drainage thereof for purposes of improvement is lawful, though it deprive a neighbor of his supply. *Ellis* v. *Duncan*, 21 Barb. (N. Y.) 230. These last two analogies tend to support the present decision, whether we regard the defendant's right to surface water as absolute or as restricted to reasonable user.

WILLS — EXECUTION — SIGNATURE OF TESTATOR AT END OF WILL. — In a will drawn upon a printed form consisting of one page, a sentence which was incomplete at the end of the space provided for bequests was finished by the testator upon the back of the form, without words or characters of reference to connect the two parts. The will was signed and attested at the bottom of the first page. *Held*, that the words on the back should be read as an interlineation, and the whole, as thus read, admitted to probate. *In the Will of Bull*, 1905 Vict. L. Rep. 38.

The testator's signature to a will need not necessarily be at its physical termination, if it follows the close of the connected literary sense. *In the Goods of Kimpton*, 3 Sw. & Tr. 427. Thus, by appropriate words or marks, a portion necessary to complete the will may be introduced into the body, although in location upon the paper it follows the signature. *In the Goods of Birt*, L. R. 2 P. & D. 214; *Baker's Appeal*, 107 Pa. St. 381. In requiring the signature at the end, the English and Victorian acts differ from the American statutes by the addition of 15 and 16 Vict., c. 24, which has been regarded as permitting the court to consider what the testator intended to be the end of his will. See *Matter of Conway*, 124 N. Y. 455. Doubtless that amendment did temper the English rule, but it still provides that no part of the will shall follow the signature, and seems insufficient to explain this case without recourse to the principle of incorporation by reference. That, however, requires such words or marks within the will as to identify the outside writing with certainty. *In the Will of Ellen Wyatt*, 21 Vict. L. Rep. 571. It seems too ample an extension of the principle to permit mere continuity of sense to furnish that reference.

WITNESSES — IMPEACHMENT — PREVIOUS HYPNOTISM OF WITNESS. — *Held*, that an admission by a witness on cross-examination that she had three times been hypnotized by the prisoner is admissible as affecting her credibility. *State* v. *Exum*, 50 S. E. Rep. 283 (N. C.).

The effect of hypnotism upon witnesses presents a new and interesting problem. In its analysis the distinction should be clearly kept between the condition of the witness when in a state of hypnosis and that when acting from suggestions placed during a previous state of hypnosis. In the former, his senses are necessarily so much in abeyance that detection would be inevitable; and as his mind is under the control of another, he should be held incompetent. *Cf. Worthington & Co.* v. *Mencer*, 96 Ala. 310. But if the witness is acting from suggestions placed during a previous state of hypnosis, his independence is taken away only to the extent of such suggestions. To determine his competency, therefore, the judge must find whether it is probable that he has been placed under hypnotic control at a time and under circumstances when suggestions could have been and were placed as to the facts in the case. *Cf. Bartlett* v. *Smith*, 11 M & W. 483. If this is probable, as the witness would follow out suggestions so placed irrespective of the actual facts, he should be held at least incompetent to testify in behalf of the party responsible for his condition.

BOOKS AND PERIODICALS.

I. LEADING LEGAL ARTICLES.

PARTIAL REVOCATION OF A WILL BY OBLITERATION. — In a recent article the question whether or not a will may be partially revoked by obliteration is discussed, and the few cases in point reviewed. *The Partial Revocation of a Will by Obliteration*, Anon., 9 L. Notes (N. Y.) 5 (April, 1905). In those jurisdictions where the English Statute of Frauds has been followed, it is provided